Nos. 79-1711, 79-1754, 79-1760 and 80-12

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL., PETITIONERS

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NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1754

JOINT MEETING OF ESSEX AND UNION COUNTIES, PETITIONER

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 79-1760

CITY OF NEW YORK AND ABRAHAM BEAME, PETITIONERS

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NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

No. 80-12

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. (& Supp. I) 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g).

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* Other petitioners in No. 80-12 are Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army. Douglas M. Costle is now the Administrator of EPA and Clifford L. Alexander is now the Secretary of the Army.

Other petitioners in No. 79-1711 are Bergen County Sewer Authority, Passaic Valley Sewerage Commissioners, the Linden Roselle Sewerage Authority and Middletown Sewerage Authority.

Gosta Lovgren is a respondent in all petitions.

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act (Clean Water Act) and the Marine Protection, Research, and Sanctuaries Act of 1972.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 616 F.2d 1222. The opinion of the district court (Pet. App. 35a-59a) is unofficially reported at 12 E.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-34a) was entered on February 5, 1980. The petition in No. 79-1711 was filed on April 29, 1980, and the petitions in Nos. 79-1754 and 79-1760 were filed on May 5, 1980. On April 24, 1980, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari in No. 80-12 to and including July 4, 1980, and that petition was filed on July 3, 1980. All petitions were granted on October 20, 1980, limited to the questions stated herein (J.A. 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 505 of the Clean Water Act, 33 U.S.C. 1365, and Section 105(g) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g), are set forth in the Appendix, *infra*.

STATEMENT

1. Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the

[1] "Pet. App." refers to the appendix in No. 80-12.

association. On January 14, 1977, those two respondents brought suit, on behalf of themselves and all others similarly situated, against petitioners in the United States District Court for the District of New Jersey.

The complaint alleges that the City of New York and other New York and New Jersey municipalities in the New York City metropolitan area discharge sewage, dredge spoil, and other toxic materials into the Hudson River and New York Harbor and that the discharged waste eventually is carried into the Atlantic Ocean (J.A. 23a). It is further alleged that various municipalities and the Army Corps of Engineers dump toxic substances directly into the Atlantic Ocean (J.A. 23a-24a). Some of these discharges and dumpings are said to be authorized by permits issued by the Corps of Engineers and by the Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*,[2] and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.* (J.A. 23a-24a, 30a-32a), whereas other discharges and dumpings are alleged to be in violation of permits that have been issued (J.A. 37a).

The complaint alleges that these pollutants caused a massive growth of algae in 1976 in an area extending more than twenty miles offshore from Long Island to Cape May, New Jersey (J.A. 25a). The claim is that when this algae mass bloomed and died it settled on the ocean floor, and its decomposition

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[2] The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

created an oxygen deficiency that caused severe damage to marine life in the area (Pet. App. 3a). The complaint charges that the discharges and dumpings "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean" (J.A. 26a).

The complaint alleges violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA or "Ocean Dumping Act"), 33 U.S.C. 1401 *et seq.*, Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, the federal common law of nuisance, the Fifth, Ninth and Fourteenth Amendments to the Constitution and New York and New Jersey statutes. The jurisdiction of the district court is invoked under 28 U.S.C. 1331(a), 1332, 1337, 1343 and 1361, 42 U.S.C. 1983, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 28 U.S.C. 2671 *et seq.*, the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740, and under 28 U.S.C. 1333(1). The relief sought includes the imposition of fines and penalties against the dischargers to be paid in part to the plaintiffs (J.A. 42a, 45a), a declaration that the federal petitioners have failed to comply with the requirements of the Clean Water Act, MPRSA and NEPA (J.A. 42a), mandamus to compel the federal petitioners to revoke all permits allowing discharges into New York Harbor, the Hudson River and the Atlantic Ocean (J.A. 43a) and an injunction against

the dischargers to prevent further dumping (J.A. 43a-44a). In addition, the complaint seeks $250 million in actual damages and $250 million in punitive damages to be "assessed against defendants jointly and severally" (J.A. 41a).

2. Petitioners moved to dismiss the claims under Fed. R. Civ. P. 12(b). The district court treated the motion as one for summary judgment and ordered the complaint dismissed with prejudice, except that some of the state law claims were dismissed without prejudice (Pet. App. 60a-61a).

The district court dismissed the claims under the Clean Water Act and the MPRSA for lack of jurisdiction because the plaintiffs did not comply with the procedural requirements of the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g), in particular the requirement that 60 days' notice be given to EPA and to the alleged violator prior to the commencement of suit (Pet. App. 45a-46a). The court rejected the argument that jurisdiction exists under 28 U.S.C. 1331 over an implied right of action derived from the savings clauses of those statutes, 33 U.S.C. 1365(e) and 1415(g)(5), which is not subject to the specific requirements of the citizen suit provisions, ruling that "[t]he manifest purpose of the savings clause seems to be the preservation of existing rights, not the creation of new ones" (Pet. App. 49a). The court also dismissed the claim under the federal common law of nuisance on the ground that private parties lack standing to raise such a claim (*id.* at 40a-41a).

As to the other claims, the court held that no private right of action exists under Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 (Pet. App. 41a-42a), and that the complaint did not state

a claim of a violation of a constitutional right or any property interest cognizable under the Fifth Amendment (*id.* at 51a-53a). It also ruled that EPA could not be liable for a violation of NEPA because of the specific exemption contained in 33 U.S.C. 1371(c) (*id.* at 50a) and that there was no basis for suit under the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740 (*id.* at 53a). Finally, the court rejected the claim that admiralty jurisdiction existed under 28 U.S.C. 1333(1) over a maritime tort action for nuisance, ruling that the pleadings did not allege a cause of action in maritime tort and, even if they did, such a claim would be barred because the plaintiffs had not complied with the requirements for suit under the FTCA or the relevant state tort claim statutes (*id.* at 53a-57a).

3. The court of appeals reversed in part, reinstating the claims under the Clean Water Act, the MPRSA, the federal common law of nuisance and in maritime tort.[3] With respect to the claim under the Clean Water Act, the court of appeals agreed that the district court had no jurisdicion under 33 U.S.C. 1365 because the plaintiffs had not met the procedural requirements of the citizen suit provision (Pet. App. 4a-6a). However, in light of the savings clause, 33 U.S.C. 1365(e), the court found that the citizen suit provision was not the exclusive basis for jurisdiction under the Clean Water Act (Pet. App. 6a-11a). Applying the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals noted that the plaintiffs were members of the " 'class for whose

[3] The court vacated the dismissal of the NEPA claim, remanding it for reconsideration in light of further development of the record (Pet. App. 28a-29a), and it affirmed the dismissal of the other claims.

especial benefit the statute was enacted' " (Pet. App. 13a) and implication of a private remedy on their behalf would be " 'helpful' to the effectuation of" the purposes of the Clean Water Act (*id.* at 15a). Accordingly, it concluded that an implied private right of action existed under the Clean Water Act on behalf of individuals injured by pollution in violation of those statutes (*id.* at 11a-16a). Because this implied right of action was unfettered by the procedural restrictions of the citizen suit provisions, the court of appeals held that the district court had jurisdiction to hear the statutory claim under 28 U.S.C. 1331. The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the Clean Water Act for these purposes. Thus, it held that the savings clause of the MPRSA, 33 U.S.C. 1415(g)(5), also preserved an implied private right of action under that statute, distinct from the citizen suit authorized by 33 U.S.C. 1415(g), that the district court had jurisdiction to entertain (Pet. App. 16a-18a).

The court of appeals also reinstated the plaintiffs' federal common law of nuisance claim, holding that private parties have standing to maintain such an action (Pet. App. 20a-24a). The court ruled that the federal cause of action established in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), although that case itself involved a state as plaintiff, was applicable whenever there is a "clear and overriding federal interest in uniformity," regardless of the identity of the parties (Pet. App. 21a). In addition, the court held that the federal common law of nuisance gave rise to an action for damages in this case (*id.* at 23a-24a). Finally, the court ruled that the plaintiffs' complaint could be read as alleging a mari-

time tort over which the district court had admiralty jurisdiction under 28 U.S.C. 1333 (Pet. App. 24a-27a). With reference to these tort claims, the court of appeals agreed with the district court that the plaintiffs had failed to comply with the procedures required by the Federal Tort Claims Act, but did not decide whether sovereign immunity precluded the recovery of damages from the federal petitioners under a federal common law tort theory (*id.* at 27a-28a).

SUMMARY OF ARGUMENT

I.

The question whether a private right of action should be implied under a statute is basically one of legislative intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). This Court has identified four factors, which are not to be given equal weight, as indicative of legislative intent in this context. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

Under the Clean Water Act and the MPRSA, Congress enacted special citizen suit provisions, 33 U.S.C. 1365(e) and 33 U.S.C. 1415(g)(5), to permit private persons to sue to enforce those statutes. These provisions are carefully limited to permit only suits for injunctive relief and, in the case of the Clean Water Act, for civil penalties. The suits may be brought only for violations of established standards or regulations or to compel the Administrator to perform a mandatory duty. In addition, the provisions contain other requirements relating to notice, venue, and abstention from suit if government enforcement actions are pending. It is almost in-

conceivable that, at the same time that Congress enacted these citizen suit provisions, it intended that another private right of action be implied in favor of persons injured by pollution, free from the limitations of the expressly authorized right of action.

The plain language of the statutes, supported by the legislative history, indicates that Congress intended the citizen suit provisions to be the exclusive vehicle for private suits alleging violations of the Clean Water Act and the MPRSA. First, there is no evidence that Congress intended to restrict the citizen suit provisions to "private attorneys general," while permitting a broader cause of action under the statutes for persons suffering economic injury. Second, the common sense interpretation of the savings clauses, which is confirmed by the paraphrasing of the clauses in the Committee Reports, is that they are aimed only at preserving rights of action under *other* statutes or the common law and do not contemplate the existence of an implied cause of action under the Clean Water Act or MPRSA itself. Finally, the history of these statutes, and of the prototype citizen suit provision in the Clean Air Act, 42 U.S.C. (Supp. I) 7604, manifests Congress' intent that private actions outside the confines of the citizen suit provisions, such as suits for damages, not be available under the Clean Water Act or the MPRSA.

In light of the clear legislative intent, no further examination of the *Cort* factors is necessary. In any event, those factors indicate that no private right of action should be implied here. The plaintiffs are not members of a class for whose especial benefit these statutes were passed; the Clean Water Act and the MPRSA are statutes passed for the benefit of the general public. Moreover, the private right of action

found by the court of appeals conflicts with the purposes of the statutes in that it interferes with Congress' intended role for the agency in establishing and enforcing effluent standards. Accordingly, the court of appeals erred in finding an implied private right of action under the Clean Water Act and the MPRSA in addition to that provided in the citizen suit provisions.

II.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court held that a state could sue under the federal common law of nuisance to abate pollution in interstate waters. Although the Court explained that this remedy was necessary to protect a state's sovereign interest in unpolluted water, it noted that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. As in *Illinois* v. *City of Milwaukee*, the nature of the pollution here requires the application of federal law. The quality of interstate water, as well as that of ocean waters, has always been a matter implicating an overriding federal interest, as evidenced by several federal environmental protection statutes. Moreover, application of state law to this interstate controversy, with its potential for inconsistent results, would be inappropriate.

There is no reason to prohibit the application of this federal law in suits brought by private parties. The United States is entitled to invoke the federal common law of nuisance as a plaintiff. And, in a different context, this Court has permitted a private party to bring a suit under federal law concerning the condition of an interstate stream. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938). The right of a private party to

bring a federal common law of nuisance action, however, exists only where an overriding federal interest is implicated and where the plaintiff has suffered damage that is different in kind from that suffered by the general public.

III.

The Clean Water Act expressly saves all other remedies at common law. The legislative history makes specific mention of pending actions under the federal common law of nuisance and notes that the ability to bring such actions will not be affected by the Clean Water Act. Thus, it is apparent that Congress did not intend to preempt the federal common law of nuisance in passing the Clean Water Act. The MPRSA contains a similar savings clause, and nothing in its legislative history contradicts the conclusion that the MPRSA also intended to preserve all other remedies, including the federal common law of nuisance.

ARGUMENT

I. NO PRIVATE RIGHT OF ACTION CAN BE IMPLIED UNDER THE CLEAN WATER ACT OR THE MPRSA APART FROM THE CITIZEN SUITS EXPLICITLY PROVIDED FOR IN THOSE STATUTES

In 1972, Congress passed the Clean Water Act as a means of exerting greater federal supervision over the preservation of water quality in the navigable waters of the United States.[4] The Act directs the Administrator of EPA to set effluent limitations for

[4] Prior to 1972, the original Federal Water Pollution Control Act had assigned to the states the primary responsibility for the development of water quality standards and enforcement. See 33 U.S.C. (1970 ed.) 1151 *et seq.*

various categories of "point sources," outlets from which pollutants are discharged into the water. 33 U.S.C. (& Supp. I) 1311(b). See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). It is unlawful for any person to discharge pollutants into the Nation's waters without a permit issued by EPA (or a state agency authorized by EPA to issue permits), which incorporates the effluent limitations and other applicable requirements. 33 U.S.C. (& Supp. I) 1342. In addition to the customary opportunity for private participation in the administrative process, the Clean Water Act provides for judicial review of EPA decisions setting effluent limitations and issuing or denying permits. 33 U.S.C. 1369(b)(1). See generally *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980). The MPRSA establishes a similar permit program governing the transportation of waste material from the United States for dumping in the ocean waters. 33 U.S.C. 1412-1414.

The Clean Water Act and the MPRSA provide for actions by the government to enforce the water quality standards and permit systems. See 33 U.S.C. (& Supp. I) 1319; 33 U.S.C. 1415. In addition, however, they provide for limited public participation in enforcement by means of citizen suits. 33 U.S.C. 1365; 33 U.S.C. 1415(g). The citizen suit provision of each statute is modeled on a prototype provision enacted in 1970 as part of the Clean Air Act, 42 U.S.C. (Supp. I) 7604, but they are not identical.[5]

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[5] Several other statutes also contain citizen suit provisions modeled on the Clean Air Act. See Noise Control Act of 1972, 42 U.S.C. 4911; Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6972; Endangered Species Act of 1973, 16 U.S.C. 1540(g); Safe Drinking

Under the Clean Water Act, a citizen may sue any person who is violating an effluent limitation or related order of the Administrator, and the federal district courts have jurisdiction of such suits to enforce the effluent limitation or order or to assess civil penalties against the violator. 33 U.S.C. 1365(a)(1). A citizen may also sue to compel the Administrator to perform a non-discretionary duty. 33 U.S.C. 1365 (a)(2). Under the MPRSA, a citizen may sue in federal district court to enjoin any person from violating any limitation or permit established or issued under the Act. 33 U.S.C. 1415(g)(1). In addition to the limitations on the nature of the suit and the type of relief available, the provisions contain additional restrictions on this private right of action: a requirement that 60 days' notice be given to the Administrator and the alleged violator before a suit is filed (33 U.S.C. 1365(b); 33 U.S.C. 1415 (g)(2)(A)); a prohibition against bringing the suit if the government is diligently prosecuting an enforcement action (33 U.S.C. 1365(b)(1)(B); 33 U.S.C. 1415(g)(2)); and a limitation of venue in the Clean Water Act to the district in which the violation occurs (33 U.S.C. 1365(c)). Finally, both statutes contain a savings clause to the effect that the citizen suit provision does not restrict any person's right to sue "under any statute or common law to seek enforcement * * * or * * * any other relief." 33 U.S.C. 1365(e); 33 U.S.C. 1415(g)(5).

Focusing on the Clean Water Act, the court of appeals held that the citizen suit provision is not the

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Water Act, 42 U.S.C. (& Supp. I) 300j-8; Toxic Substances Control Act, 15 U.S.C. 2619-2620; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1270; Deepwater Port Act of 1974, 33 U.S.C. 1515.

exclusive basis for private suits under the Act. The court stated that the citizen suit provision is designed to permit non-injured parties to sue as "private attorneys general" to enforce the provisions of the Act without meeting the $10,000 jurisdictional amount requirement. Thus, the court concluded, the citizen suit provision has no application to a suit by a private party who is injured by the alleged violation; the savings clause preserves his right to sue without regard to the limitations of the section (Pet. App. 8a-9a). Applying the analysis of *Cort* v. *Ash, supra,* the court of appeals found that the Clean Water Act created an implied private right of action for persons injured by violations of the Act (Pet. App. 11a-15a). In our view, this conclusion is erroneous.

The standards for determining when a private right of action should be implied under a statute are well established; it is basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago,* 441 U.S. 677, 688 (1979). This Court has identified four factors as being relevant to this determination because they are indicative of legislative intent. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 688; *Cort* v. *Ash, supra,* 422 U.S. at 78. Briefly, those factors are (1) whether the plaintiffs come within the class of persons for whose especial benefit the statute was enacted; (2) whether there is any express or implicit indication of congressional intent to create or deny such a cause of action; (3) whether the existence of or right to bring such an action would be consistent with the purposes of the legislative scheme; and (4) whether the cause of action involves a matter traditionally

relegated to state law, in an area basically of concern to the States, so that it would be inappropriate to infer a federal cause of action. Because "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," however, the four *Cort* factors are not of equal significance. *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575. Where the congressional intent not to create a private right of action is clear, it is of no relevance whether such an action might be deemed a useful adjunct to the legislative scheme or whether or not the subject matter of the statute is traditionally a state concern. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576, 578. In our view, the court of appeals misapplied these principles by failing to recognize Congress' manifest intent to limit the private right of action created by the Clean Water Act and MPRSA.

A. The Clean Water Act And The MPRSA Draw No Distinction Between Plaintiffs Based On The Type Of Injury Alleged

The starting point of the analysis must be the statutory scheme itself. See *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 568. The very existence of the detailed citizen suit provision belies the notion that another right of action should be implied under the statutes. As this Court has remarked, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 19; see also *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458

(1974). In this case, not only do the statutes expressly provide a remedy, but that remedy is one exclusively designed for *private* parties and subject to carefully articulated limitations. It strains credulity to imagine that Congress expressly established a private right of action subject to restrictions, while " 'absentmindedly [forgetting] to mention' " the creation of a second private right of action free from those restrictions. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 20. Surely, Congress' failure to make an explicit reference to this second right of action suggests that it had no intent to create it.

The court of appeals failed to draw this obvious inference from the express provision of a private remedy because it felt that the citizen suit provisions in no way concern the rights of persons actually injured by violations of the statutes (Pet. App. 8a). But the language and legislative history of these statutes provide no support for the distinction drawn by the court of appeals, *i.e.*, that the citizen suit provisions were designed to apply exclusively to suits by non-injured "private attorneys general," while persons actually injured could invoke an implied right of action. Indeed, the legislative history of the Clean Water Act provides strong evidence to the contrary.

As the court of appeals pointed out (Pet. App. 6a-8a), the definition of "citizen" in 33 U.S.C. 1365(g)[6] was intended to incorporate this Court's interpretation of Section 10 of the Administrative Procedure Act, 5 U.S.C. 702, in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). See S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 146 (1972). Thus, a suit by persons

[6] A "citizen" is defined for the purpose of a citizen suit as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. 1365(g).

who suffer non-economic injury is permitted under the citizen suit provision. But, contrary to the finding of the court of appeals, the citizen suit provision is not restricted solely to these types of suits.[7] The inclusion of the *Sierra Club* standard in the Act represented an extension of the narrower citizen suit provision contained in the House bill. That provision had included a requirement that a person's "direct interest" be affected in order to be eligible to sue,[8] and therefore it had been criticized as limiting the availability of the citizen suit provision to "persons owning property which is directly affected by the pollution." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 407-409 (1972), *reprinted in* 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 876-878 (Comm. Print 1973) (hereinafter "Leg. Hist.") (additional views of Reps. Abzug and Rangel). See also *id.* at 417, 1 Leg. Hist. 886.

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[7] The court of appeals stated that the citizen suit provisions apply only to "non-injured" members of the public (Pet. App. 8a). It is clear, however, that Congress considered any person eligible to sue under the *Sierra Club* test as being "injured." See, *e.g.*, 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 179 (Comm. Print 1973). The distinction drawn by the court of appeals thus seems to be between economic and non-economic injury.

[8] Section 505(g) of the House bill provided:

> For the purposes of this section the term "citizen" means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

H.R. 11896, 92d Cong., 2d Sess. (1972), 1 Leg. Hist. 1077.

In sum, the provision as enacted did not create a special rule for non-economic injury. On the contrary, it equated economic injury, which had been covered even under the House version, with non-economic injury for the purposes of citizen suits. As Senator Muskie, who was perhaps the primary author of the Clean Water Act (see *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. at 129), stated in his explanation of the Conference Report, "a citizen suit may be brought only by those persons or groups which are among those whose interest (whether environmental or economic) is or may be injured by the violation of the Act which is the basis for the suit." 1 Leg. Hist. 179. Although, as Senator Muskie stated, "a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit," 1 Leg. Hist. 221, Congress clearly intended that an economic interest as well could give rise to a citizen suit under 33 U.S.C. 1365.

B. Congress Had No Intent To Create A Private Remedy Under These Statutes Other Than That Specified In the Citizen Suit Provisions

According to the court of appeals, the independent remedy for persons economically injured by violations of the pollution statutes is provided by the savings clauses, 33 U.S.C. 1365(e), 33 U.S.C. 1415(g)(5) (Pet. App. 9a). Although the clauses do refer to saving a right to sue under "any statute," the court's interpretation defies common sense. A savings clause does not create new remedies; it preserves ones that are already in existence. It is a distortion of the concept of a savings clause to say that a statute "saves" a remedy that is being created—especially implicitly—by the very same statute. Thus, it seems

clear that in enacting the savings clauses of the Clean Water Act and MPRSA, Congress was focusing on preexisting remedies under other statutes and the common law, not intimating that another private remedy should be created by implication under these statutes.

This conclusion is supported by the legislative history of the statutes. The Committee Reports for both the Clean Water Act and the MPRSA, in discussing the savings clause, describe it as preserving rights "under any *other* law." S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971); S. Rep. No. 92-451, 92d Cong., 1st Sess. 23-24 (1971); H.R. Rep. No. 92-361, 92d Cong., 1st Sess. 23 (1971) (emphasis added). The court of appeals stated that it was "not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act" (Pet. App. 14a). Undoubtedly, the court is correct in its view that the paraphrase in the legislative history was not *intended* to preclude the finding of a private remedy, but the consistent use of the word "other" in paraphrasing provides strong support for the common sense conclusion that Congress was focusing on rights under other laws in enacting the savings clause. Indeed, it is quite likely that Congress never even considered the possibility that another private right of action would be implied under the Clean Water Act and the MPRSA themselves, much less specifically intended to create such a remedy.

Moreover, the legislative history of the relevant statutes demonstrates Congress' intent that the citizen suit provisions be the exclusive vehicle for a private right of action. Because the citizen suit provisions involved here are closely modeled on those of

the Clean Air Act (see S. Rep. No. 92-414, *supra*, at 79), the legislative history of the Clean Water Act and the MPRSA generally focus only on the differences between their provisions and those of the prototype. To understand the general principles underlying these citizen suit provisions, it is necessary to turn to the legislative history of the Clean Air Act itself.

The legislative history of the Clean Air Act clearly indicates that private rights of action under the Act were limited to those authorized by the citizen suit provision. The Senate Report noted that citizen actions would be "carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36 (1970). Accordingly, the Report concluded that inconsistent enforcement would not be engendered by citizen suits because the standard to be met would already have been established in the agency proceeding, and therefore the issue before the court would simply be "a factual one of whether there had been compliance." *Id.* at 38. In addition, the Report made it clear that there was no "provision for the recovery of property or personal damages." *Ibid.*

Despite these limitations, there was some concern expressed on the floor of the Senate over the possibility that the passage of the Clean Air Act Amendments would lead to a flood of private lawsuits that would increase the burden on the federal courts. In response, Senator Muskie explained the limited scope of the citizen suit provision contained in S. 4358, which was ultimately enacted as part of the Clean Air Act, by comparing it to a broader citizen suit provision that had been contained in S. 3201, an earlier version of the bill:

> Senate bill 3201 * * * is a class action bill. S. 4358 is not. S. 4358 is limited to citizens acting on their own behalf.
>
> Senate bill 3201 provides damages and a remedy for recovery of fines and restitution, and other monetary damages. The pending bill is limited to seek abatement of violation of standards established administratively under the act, and expressly excludes damage actions.
>
> Senate bill 3201 provides for redress of consumer injury. The pending bill is limited to an action for enforcement on abatement of violations of administratively set standards.

116 Cong. Rec. 33102 (1970).

Later in this discussion, Senator Hart also responded to these concerns by emphasizing that the bill did not permit a private suit for damages:

> It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S. 4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated.

116 Cong. Rec. 33104 (1970).

Thus, there can be no doubt that Congress specifically intended that a suit such as that brought by the plaintiffs in this case, seeking redress for alleged consumer injury through damages and other relief not authorized by the citizen suit provision, could not be maintained under the Clean Air Act. Nothing in the language or the legislative history of the Clean Water Act or the MPRSA suggests that

Congress intended to work such a major alteration in this scheme of citizen participation in enforcement—a scheme that to all appearances was superimposed without significant change upon the water pollution statutes—as authorizing private parties to sue for damages for injuries caused by statutory violations. And it is almost inconceivable that Congress would effect such a major change by implication, only two years after deliberately refraining from permitting such suits because of a recognized danger of increasing the burden of the courts.

Moreover, the legislative history of the Clean Water Act buttresses the conclusion that, as under the Clean Air Act, no private right of action exists apart from the citizen suit provision. The Senate Report notes that "[a]s in [the Clean Air] Act, the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 92-414, *supra*, at 79. As under the Clean Air Act, the only issue before the court in a citizen suit would be whether a polluter has complied with an administratively set standard. *Id.* at 80. With respect to the one modification made in the nature of the remedies available, the addition of civil penalties, the Report specifically noted that "any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." *Id.* at 79. There was no provision in the Act for the recovery of damages, but, under the savings clause, "if damages could be shown, other remedies would remain available." *Id.* at 81.

C. Application Of the *Cort* Factors Also Suggests That No Private Right Of Action Should Be Implied

In light of the clear legislative intent not to create a private right of action apart from the citizen suit provisions, as evidenced by the statutes themselves and the pertinent legislative history, there is no need to consider the other *Cort* factors. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576, 578. In any event, an examination of those factors supports the conclusion that the court of appeals erred in implying a private cause of action.

The court of appeals found, without discussion, that "individuals likely to suffer actual injury by the pollution" was the class for whose *especial* benefit the Clean Water Act was enacted (Pet. App. 13a). This statement apparently refers to economic injury. See note 7, *supra*. It would appear, however, that the Clean Water Act and the MPRSA were enacted to protect a much broader class of persons than those who derive their livelihood from the water. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" toward the goal of providing "for the protection and propagation of fish, shellfish, and wildlife" and "recreation in and on the water." 33 U.S.C. 1251(a). The policy of the MPRSA is "to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401(b). Both statutes certainly recognize that one of the benefits and goals of improved water quality is the protection of fish and

that the failure to protect fish can have adverse economic consequences on individuals. See 33 U.S.C. (Supp. I) 1364(a); 33 U.S.C. 1412(a)(C). But the statutes exhibit a much broader purpose than simply protecting the livelihood of fishermen. Congress clearly was also concerned with non-economic issues, such as alleviating dangers to human health, wildlife, beaches and ecological systems generally, as well as with preserving esthetic and recreational values. See, *e.g.*, 33 U.S.C. (& Supp. I) 1314(a); 33 U.S.C. 1412 (a). Under the MPRSA, the legislative history indicates Congress' particular concern over the long-term dangers of deterioration of ocean waters and the marine ecosystem. See S. Rep. No. 92-451, *supra*, at 9-13. Under these circumstances, the Clean Water Act and the MPRSA are best described as statutes enacted for the benefit of the general public. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690. The fact that the plaintiffs derive a more direct economic benefit from these statutes than most members of the general public does not militate in favor of implying a private right of action in their favor under the first *Cort* factor.

With respect to the third *Cort* factor, the court of appeals simply found that implication of a second private right of action would be "helpful" to the purposes of the Clean Water Act (Pet. App. 15a). Of course, the institution of any lawsuit based on the violation of a statute will be of some assistance in enforcing the statute. To that extent, the plaintiffs' action furthers the purposes of the underlying statutes here. However, if this benefit is sufficient to justify the implication of a private right of action under a statute, such causes of action would be implied under all statutes. Clearly, a more searching

inquiry into the purposes of the statute is necessary. In this case, the statutory schemes and the legislative history indicate that the private right of action implied by the court of appeals is at odds with the purposes of the Clean Water Act and the MPRSA.

First, the primary responsibility for enforcement of the Clean Water Act and the MPRSA rests with the government. Citizen suits have been established as a supplement to government enforcement, but Congress restricted these private suits so as not to interfere with that enforcement. Because of this deference to the agency, citizen suits may not be brought if agency enforcement proceedings under the statute are pending. See 33 U.S.C. 1365(b)(1)(B); 33 U.S.C. 1415(g)(2). The 60-day notice provision (33 U.S.C. 1365(b); 33 U.S.C. 1415(g)(2)(A)), which gives the agency an opportunity to institute administrative or judicial proceedings before a citizen suit is filed, was included specifically "to further encourage and provide for agency enforcement." S. Rep. No. 92-414, *supra*, at 79. A private right of action for statutory violations that is free from the restrictions of the citizen suit provisions would disrupt this preference for agency enforcement. It would permit private lawsuits to go forward before the agency has had an opportunity to decide if judicial enforcement is advisable, and it could allow for duplicative lawsuits where an agency enforcement action is instituted.

Second, Congress clearly intended to restrict private suits alleging violations of these statutes to the issue of enforcement of standards and regulations already established through the administrative process. Thus, a citizen suit, as contemplated by Congress, does not require the reevaluation of technical data at the enforcement stage; "[t]hese matters will

have been settled in the administrative procedure leading to the establishment" of an effluent limitation. S. Rep. No. 92-414, *supra*, at 79. However, under the court of appeals' decision, private suits may be brought that challenge already settled agency action, such as the effluent standards involved in this case. Such suits would seriously infringe on the responsibilities and role of the agency as delineated by Congress, because the technical questions of proper effluent limitations under the statute would be before the courts although they had already been decided administratively.[9] See generally S. Rep. No. 92-414, *supra*, at 80-81.[10]

This is not a case where Congress has been silent concerning the interaction between private and agency enforcement. Congress carefully considered the possible tension between the two types of enforcement, and it limited the availability of private suits based on statutory violations so as to preserve the agency role contemplated by the pollution control statutes. Elimination of those limitations for certain classes of private suits would seriously undermine the statutory scheme.

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[9] These administrative determinations are, of course, subject to judicial review at the time they are made. See 33 U.S.C. 1369.

[10] We do not suggest, of course, that a challenge to a discharge of pollutants is prohibited simply because a permit has been issued for that discharge through the agency process. A discharge may still be subject to challenge because it violates standards established by state statute or by the common law, either state or federal. See 33 U.S.C. 1365(e); 33 U.S.C. 1415(g)(5). But no private action may be brought under the Clean Water Act or the MPRSA, claiming a violation of those statutes, against a discharger who is complying with a properly issued permit.

The fourth *Cort* factor is somewhat equivocal and sheds no light on the issue. The condition of the navigable waters of the United States is an area of important federal concern, but water pollution and private actions seeking relief from it are areas that traditionally have been the concern of state law as well. In sum, analysis of the *Cort* factors clearly indicates that no private right of action should be implied under the Clean Water Act or the MPRSA.

The only court of appeals to consider the question is in accord with this conclusion. The Seventh Circuit, applying the *Cort* factors, has concluded that no private right of action can be implied under the Clean Water Act. *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012-1016 (1979), cert. denied, 444 U.S. 1025 (1980). That court, although not focusing on the question of an implied remedy, has also held that the 60-day notice requirement is a bar to any private suit under the Clean Air Act. *City of Highland Park* v. *Train*, 519 F.2d 681 (7th Cir. 1975).[11]

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[11] The two cases on which the court of appeals relied, *Natural Resources Defense Council* v. *Callaway*, 524 F.2d 79 (2d Cir. 1975), and *Natural Resources Defense Council* v. *Train*, 510 F.2d 692 (D.C. Cir. 1974), did not consider the question of an implied private right of action. Those cases held that the citizen suit provision was not the exclusive *jurisdictional* basis for suits under the Clean Water Act; the savings clause preserved the right to invoke jurisdiction under 28 U.S.C. 1331. This conclusion is correct, but 28 U.S.C. 1331 can be invoked only if the plaintiff has a cause of action "arising under federal law." A private party has no cause of action "arising under" the Clean Water Act or MPRSA except as provided in and limited by the citizen suit provisions.

Because Congress did not intend to permit such suits, the bulk of the plaintiffs' statutory claims, notably those seeking damages and those challenging properly issued permits, were correctly dismissed by the district court for failure to state a claim. Some portions of the complaint, notably those seeking enforcement of existing permits, advance claims that are maintainable under the citizen suit provisions of the Clean Water Act and the MPRSA. These claims are subject to the restrictions of those provisions, however, and they were correctly dismissed by the district court because of the plaintiffs' failure to comply with those restrictions.

II. A PRIVATE PARTY HAS STANDING TO BRING AN ACTION FOR DAMAGES UNDER THE FEDERAL COMMON LAW OF NUISANCE

This case also presents the question of the correctness of the court of appeals' holding (Pet. App. 20a-24a) that private parties may bring an action in federal court based on a violation of the federal common law of nuisance. As we explained in our brief in response to the petitions in Nos. 79-1711, 79-1754 and 79-1760, the resolution of this issue is of limited direct concern to the federal petitioners in this case because of other issues not passed upon by the court of appeals and not presented here. That is so because, in discussing the plaintiffs' common law claim, the court of appeals focused on its nature as a suit for damages, and sovereign immunity precludes such relief against the federal government.[12] More-

[12] The court of appeals did not rule on the sovereign immunity question because the parties had not addressed the question (Pet. App. 28a). The First Circuit, however, has held that sovereign immunity does insulate the federal gov-

over, with respect to the injunctive relief sought by the plaintiffs, the complaint does not make out a prima facie case of nuisance against the federal petitioners based upon their administration of federal permit programs.[13] A public nuisance under common law may be created by a discharge of pollutants into public waters, but, clearly, a federal agency is not guilty of creating a public nuisance simply because, in the course of its administration of a regulatory program, it does not prohibit a discharge by a private party or issues a permit concerning such a discharge. However, because of the government's strong interest in preserving the quality of our Nation's waters, we are addressing this question, which bears on the remedies available to one who suffers from such pollution.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court held that the State of Illinois had a cause of action for injunctive relief under the federal common law of nuisance to abate pollution of Lake Michigan by the City of Milwaukee. Relying on a long line of cases, this Court stated that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103. The court of appeals below rejected the contention that this common law remedy could be in-

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ernment from a damage action under the federal common law of nuisance. *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119, 123 (1976). See generally *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

[13] The plaintiffs' allegations that they are being harmed by waste dumped by the Army Corps of Engineers might make out a prima facie nuisance claim to the extent it is not barred by sovereign immunity.

voked only when the plaintiff is a state, as in *Illinois* v. *City of Milwaukee* itself. In our view, the court of appeals correctly concluded that private parties do have standing to bring an action under the federal common law of nuisance in appropriate cases.

This Court explained in *Illinois* v. *City of Milwaukee, supra*, that a federal common law of nuisance remedy to abate pollution is necessary partly because of the nature of our federal system. Each state is entitled to protect its quasi-sovereign interest in unpolluted air and water. Because the states surrendered their diplomatic powers when they entered the Union, a federal judicial remedy is necessary for the resolution of interstate pollution disputes that infringe on the sovereignty of a state. 406 U.S. at 104-107. For this reason, a federal common law remedy was clearly appropriate where the State of Illinois was the plaintiff.

The Court explicitly noted, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism," it is appropriate to apply federal common law. *Ibid.* See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-427 (1964); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Resolution of disputes over interstate water has long been considered to implicate such an overriding federal interest. See, *e.g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938); *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). And the need for application of federal law extends to disputes over pollution of interstate waters. See *Ver-*

mont v. *New York*, 417 U.S. 270, 275 n.5 (1974); *New Jersey* v. *City of New York*, 283 U.S. 473, 481-482 (1931); *New York* v. *New Jersey*, 256 U.S. 296, 301-303, 312-313 (1921); Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L. Rev. 691, 711-714 (1970). See also *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution). In light of these principles, this Court concluded that the need for application of federal law was "[c]ertainly * * * present" in an action concerning pollution of an interstate body of water such as Lake Michigan. *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 105 n.6.

In this case, the court of appeals specifically found that the plaintiffs have "sufficiently alleged pollution of interstate waters" (Pet. App. 22a) to require the application of federal standards because of the "clear and overriding federal interest in uniformity" (*id.* at 21a).[14] As in *Illinois* v. *City of Milwaukee*, *supra*, the elements are present here that require an application of federal law. The overriding federal interest in the quality of interstate waters has long been recognized and is emphasized by the congressional enactment of the Clean Water Act and other environmental protection statutes. See *Illinois* v. *City of*

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[14] The complaint alleged damage "a few miles offshore" (J.A. 25a), and the court of appeals apparently treated this allegation as one encompassing the "territorial sea," in which the states have important property interests. The "territorial sea" extends three miles beyond the low-water line along the coast. Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 1608, T.I.A.S. No. 5639 (1964). See *United States* v. *California*, 332 U.S. 19, 33-34 (1947). In addition, pollutants discharged in the State of New York traveled down the Hudson River into New Jersey waters. The municipal petitioners have not challenged the court's finding of interstate pollution.

Milwaukee, supra, 406 U.S. at 101-103. Moreover, application of state law could lead to inconsistent results, depending on the source of the pollution, and could force one state to be bound by the "more degrading standards" of another. *Id.* at 107. Federal law should apply here, as the court of appeals concluded, because "the interstate nature of [the] controversy makes it inappropriate that the law of either state should govern." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964).

In addition to the interstate aspects of this case, the allegation that discharges within the States of New York and New Jersey have caused pollution damage in the ocean waters surely implicates an important federal interest. This federal interest in areas beyond the territorial sea, and particularly in fishery resources, is apparent from the existence of several statutes in addition to the Clean Water Act and MPRSA. See, *e.g.*, 33 U.S.C. 1411; 33 U.S.C. (Supp. I) 1321(b); Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.*; Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Thus, there can be little doubt that a federal standard must be applied to the plaintiffs' common law claim; the question raised here is whether, in spite of the existence of an overriding federal interest, a private party lacks standing to raise such a claim.[15]

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[15] This case is therefore quite different from those cases where this Court has failed to find a right of action under federal law on behalf of a private party where no overriding federal interest was implicated. See *Bank of America* v. *Parnell*, 352 U.S. 29, 33-34 (1956); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 16-17 (1888).

The right to invoke the federal common law of nuisance is not the exclusive province of individual states. Certainly, the United States can also sue in federal court to abate pollution in the navigable waters. In *In re Debs*, 158 U.S. 564, 580-587 (1895), this Court upheld the government's right, in the absence of a statute, to sue to enjoin an obstruction to interstate commerce (the Pullman strike) on the theory that it was a public nuisance in an area of federal concern. The Court noted that "a public nuisance has always been held subject to abatement at the instance of the government." *Id.* at 587. The same rule must extend to a nuisance on the Nation's waters, in light of the United States' "sovereign power * * * to control the navigable waters within its jurisdiction." *Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173, 177 (1979); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940). It can make no difference that the nuisance is pollution rather than an obstruction that interferes with navigability. Accordingly, the lower courts have uniformly recognized the existence of this right of action and have permitted the United States to sue under the federal common law of nuisance. See *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80-126 (filed July 28, 1980); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218-1220 (D. Mont. 1979); *United States* v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, 149-150 (D. Vt. 1972), 363 F. Supp. 110, 120 (D. Vt.), aff'd, 487 F.2d 1393 (2d Cir. 1973) (Table), cert. denied, 417 U.S. 976

(1974); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F. Supp. 556, 558 (N.D. Ill. 1973); cf. *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 520-521 (8th Cir. 1975) (federal common law of nuisance claim rejected because of lack of interstate effect).

Where a federal body of law already exists for suits brought by a state or the United States, there is no reason to deny to a private party the right to invoke that law in a case where important federal interests are at stake.[16] This Court has not previously had occasion to consider a suit by a private party under the federal common law of nuisance, but it has permitted a suit by a private party under the closely related body of federal common law relating to apportionment of waters. In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, *supra*, this Court granted certiorari in a case brought by a Colorado corporation against Colorado state waterway officials challenging the diversion of the waters of the La Plata River to the detriment of the plaintiff. The Court held that it had jurisdiction because questions concerning the apportionment of interstate streams are ones of "federal common law." 304 U.S. at 110. The Court concluded that "[j]urisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions * * * in suits between private litigants." *Id.* at 110-111. See generally Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1030-1032

[16] Certainly, the federal statutory scheme explicitly recognizes the strong interest that individuals have in controlling water pollution. See 33 U.S.C. 1251(a)(1), (2); 33 U.S.C. 1401(a), (b).

(1967). Thus, there is generally no bar to a suit by a private party under federal common law, provided that the suit involves the overriding federal interest that led to the creation of the federal common law, such as the water quality of an interstate stream.[17]

The lower courts generally have agreed that the federal common law of nuisance action discussed in *Illinois* v. *City of Milwaukee*, *supra*, is not restricted to suits by a sovereign state or the United States. Two courts have held that a municipality or municipal corporation is entitled to bring such a suit. *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, *supra*, 604 F.2d at 1017-1019; *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978). And one district court has held this right available to purely private parties. *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975). See also *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F.2d 1006, 1014-1016 (4th Cir. 1976) (Butzner, J., dissenting). But see *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 375 F. Supp. 1148, 1153-1154 (D. Md. 1974), aff'd on different but not inconsistent grounds, 539 F.2d 1006 (4th Cir. 1976); cf. *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd, 573 F.2d 1289 (2d Cir. 1977) (Table). In addition, Congress has

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[17] This Court has also indicated that private parties may, "in appropriate situations," invoke the federal common law concerning government paper. See *Bank of America* v. *Parnell*, 352 U.S. 29, 34 (1956) ("We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties.").

indicated its understanding that nuisance suits by private parties under the federal common law are permitted. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (or "Superfund"), H.R. 7020, 96th Cong., 2d Sess., passed by the Senate on November 24, 1980, and by the House of Representatives on December 3, 1980,[18] establishes a fund to pay for the cleanup of hazardous wastes. The legislation explicitly refers to the rights of individuals to recover damages and cleanup costs under the common law, state and federal.[19]

The right of a private party to sue under the federal common law of nuisance, of course, is more circumscribed than that of a state or the United States. First, federal law will only be applied where there is an overriding federal interest. There may be cases, involving pollution within a state, where a nuisance action under state law may be adequate to vindicate the interest of a private plaintiff, although application of federal common law might be appropriate if suit were brought by the United States. Second, the right of a private party to sue for public nuisance has always been limited by the common law. Originally, the establishment of a public nuisance was a criminal offense and thus abatement of

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[18] See 126 Cong. Rec. S15009 (daily ed. Nov. 24, 1980); 126 Cong. Rec. H11803 (daily ed. Dec. 3, 1980).

[19] Section 107(j) provides: "Recovery by any person * * * for response costs or damages * * * shall be pursuant to existing law * * *. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance." See 126 Cong. Rec. S14954 (daily ed. Nov. 24, 1980).

a nuisance was purely the concern of the state. See *Restatement (Second) of Torts* § 821B, Comment a (1979). Later, a private tort action developed, but the common law has always limited that tort action to cases where the plaintiff suffers an injury "different in kind" from the general public, such as pecuniary loss. See *Restatement (Second) of Torts, supra,* § 821C; W. Prosser, *Law of Torts* 586-591, 604 (4th ed. 1971).

In this case, neither of these limitations bars the plaintiffs' suit. The subject matter is the pollution of interstate waters and ocean waters, an area of overriding federal concern. The plaintiffs have alleged damage that is clearly different in kind from that of the general public—economic loss of their clamming business caused by the pollution.[20] Under these circumstances, the plaintiffs have established a cause of action under the federal common law of nuisance.

III. THE CLEAN WATER ACT AND THE MPRSA DO NOT PREEMPT THE FEDERAL COMMON LAW OF NUISANCE

Whether the federal common law of nuisance has been preempted by legislation is basically a question of legislative intent. We have argued in our brief in *City of Milwaukee* v. *People of the State of Illinois,* No. 79-408 (argued Dec. 2, 1980), that the passage of the Clean Water Act did not preempt the federal

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[20] Indeed, the case of a commercial fisherman whose business is damaged by water pollution is one of the classic examples of an injury that is different in kind and gives rise to a private action for public nuisance. See W. Prosser, *supra,* at 590-591; *Restatement (Second) of Torts, supra,* § 821C, Comment h, Illustration 11; *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 568 (9th Cir. 1974).

common law of nuisance, and we rely on that brief here. The plain language of the savings clause of the Clean Water Act, 33 U.S.C. 1365(e), indicates Congress' intent to preserve all common law remedies, and the legislative history makes clear that Congress understood that the federal common law would be preserved as well.[21]

The savings clause of the MPRSA, 33 U.S.C. 1415 (g)(5), is quite similar to that of the Clean Water Act. By its terms, it preserves all other causes of action, including those under the common law. The legislative history reveals no intent by Congress to eliminate the federal common law of nuisance or any other preexisting remedy. It seems plain that Congress did not intend to preempt the federal common law of nuisance in enacting the MPRSA. Nor does the existence of a common law remedy conflict with the purposes of the MPRSA. The standards of the MPRSA will, of course, be highly relevant in determining whether a nuisance exists. But, as under the Clean Water Act, the common law remedy may supplement the MPRSA by dealing with problems not covered by the Act and by providing a remedy for damages, which is not provided under the MPRSA. Thus, the MPRSA does not preempt the federal common law of nuisance.

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[21] In addition to the legislative history discussed in our brief in *City of Milwaukee* v. *People of the State of Illinois*, *supra*, we note that Congressman Dingell, one of the co-sponsors of the Clean Water Act in the House, specifically referred to the availability of suits under the federal common law of nuisance, citing H.R. Rep. No. 92-1401, 92d Cong., 2d Sess. 31-33 (1972), which discussed two suits brought under the federal common law of nuisance. See 1 Leg. Hist. 252.

CONCLUSION

The decision of the court of appeals should be reversed with respect to the existence of an implied private right of action under the Clean Water Act and the MPRSA. The decision with respect to the federal common law of nuisance claim should be affirmed.

Respectfully submitted.

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APPENDIX

Section 505 of the Clean Water Act, 33 U.S.C. 1365, provides in pertinent part:

Citizen Suits

(a) **Authorization; jurisdiction**

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) **Notice**

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter"

means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

(g) **Citizen**

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

* * * * *

Section 105(g) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g), provides:

Civil suits by private persons

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in

controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at

the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

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